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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930—No. 455.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION OF SOUTH PENN OIL COMPANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

OSCAR R. EWING,
Counsel for South Penn Oil Company as Amicus Curiae.

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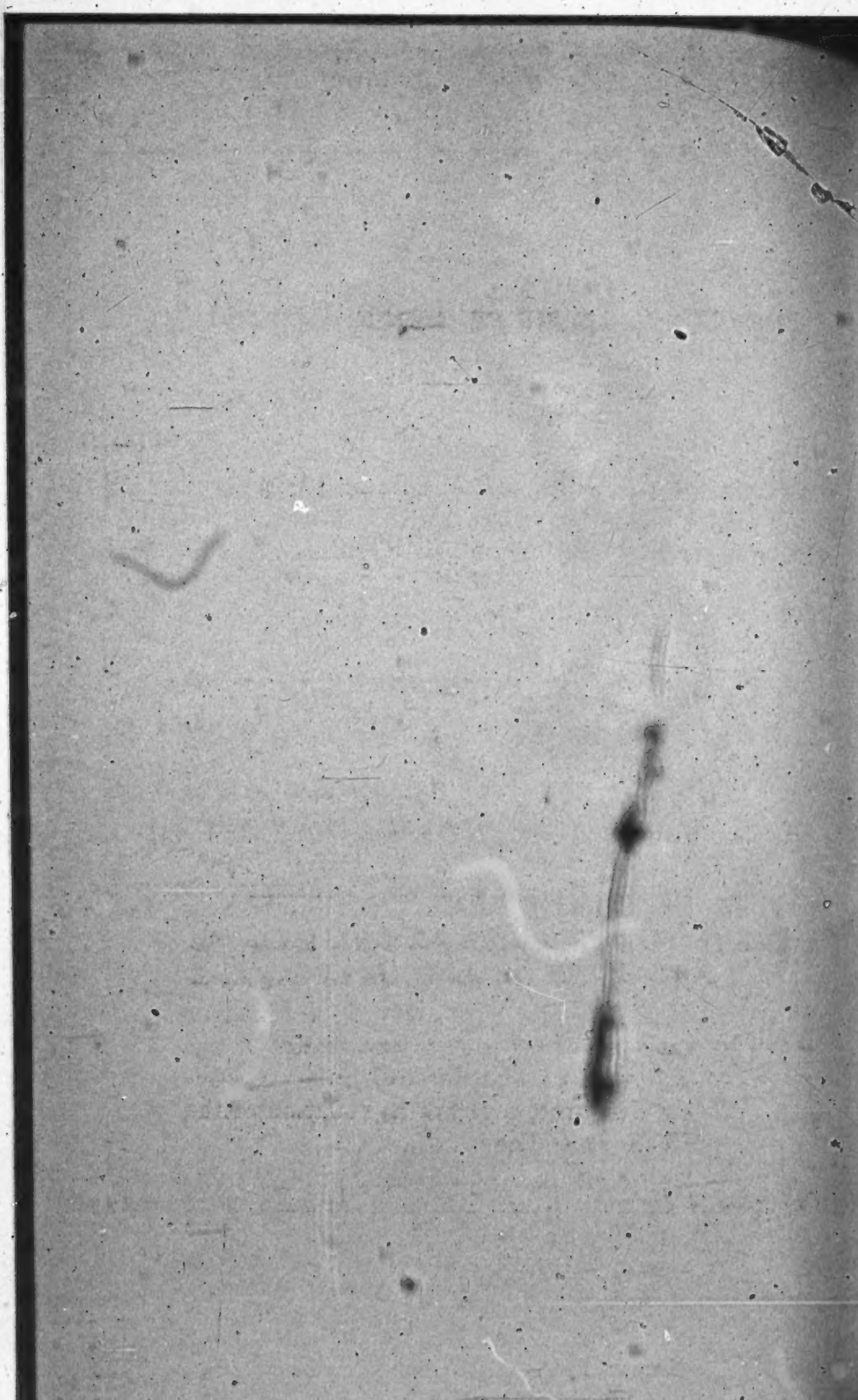

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

May it Please the Court:

The undersigned, as counsel for South Penn Oil Company, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

OSCAR R. EWING,
Counsel for South Penn Oil Company as *Amicus Curiae.*

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Respondent.

BRIEF OF SOUTH PENN OIL COMPANY, AS *AMICUS CURIAE*.

I.

Preliminary Statement.

South Penn Oil Company, which submits this brief, is the petitioner in the case of *South Penn Oil Company* v. *Commissioner*, 20 B. T. A. 1180, in which the United States Board of Tax Appeals affirmed a determination of the Commissioner of Internal Revenue that there was assessable against South Penn Oil Company under Section 280 of the Revenue Act of 1926 a transferee liability for certain unpaid taxes of Big Creek Development Company, a West Virginia corporation dissolved in 1917, because of the receipt of assets of the taxpayer. South Penn Oil Company has filed a petition for the review of the decision of the

Board of Tax Appeals by the Court of Appeals of the District of Columbia.

In both the South Penn Oil Company case and the present case, the transfers of assets, upon the basis of which the transferee liability is asserted, occurred several years before the enactment of the Revenue Act of 1926. Two contentions made by the South Penn Oil Company in its case with respect to Section 280, however, are not directly presented by the petitioners in the present case. They are, (1) that Section 280 does not apply retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment, and (2) that if it does apply retrospectively in this respect it is unconstitutional as to such a transferee.

Because of the possibility that the decision of this Court in the present case may uphold the constitutionality of Section 280 and foreclose the presentation of these contentions to this Court in its own case, South Penn Oil Company presents them in this brief and respectfully requests that this Court consider them in the present case or expressly reserve them for future consideration.

II.

ARGUMENT.

Summary of Argument.

POINT I—Section 280 of the Revenue Act of 1926 does not apply retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment.

POINT II—If Section 280 of the Revenue Act of 1926 applies retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment, it deprives such a transferee of property without due process of law in violation of the Fifth Amendment.

POINT I.

Section 280 of the Revenue Act of 1926 does not apply retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment.

The portions of Section 280 of the Revenue Act of 1926 (44 Stat. 61) which are material to the present consideration are as follows:

> "(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):
>
> "(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act."

This section does not expressly apply to a transferee with respect to property of a taxpayer transferred before its enactment, and nothing in it indicates that Congress intended that it have any such application.

The decisions of this Court have established a rule that statutes will not be construed as applying retrospectively unless the intention that they be so applied is clearly expressed or necessarily implied in them. *Shwab* v. *Doyle*,

258 U. S. 529; *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Railway Co.*, 266 U. S. 435; *United States* v. *St. Louis, San Francisco & Texas Railway Co.*, 270 U. S. 1; *Union Pacific Railroad Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190; *Lewellyn* v. *Frick*, 268 U. S. 238.

The case of *Shwab* v. *Doyle*, *supra*, like the present case, involved the question whether a statute would be construed as retrospectively applicable to a transfer made before its enactment. It was there held that Section 202 of Chapter 463 of the Act of September 8, 1916 (39 Stat. 777), which imposed a tax on the transfer of the net estate of every decedent dying after its passage to the extent of any interest therein of which the decedent had at any time made a transfer, except a *bona fide* sale, in contemplation of death, did not apply to transfers made before its passage. In its opinion, this Court said (pp. 534-535):

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. I Kent. 455; *Eidman* v. *Martinez*, 184 U. S. 578; *White* v. *United States*, 191 U. S. 545; *Gould* v. *Gould*, 245 U. S. 151; Story, Const., §1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'
>
> "There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. *It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.*

"The Act of September 8, 1916, is within the condemnation.

"There is certainly in it no declaration of retroactivity, 'clear, strong and imperative', which is the condition expressed in *United States* v. *Heth*, 3 Cranch, 398, 413; also *United States* v. *Burr*, 159 U. S. 78, 82-83.

"*If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive operation must be selected.*" (Italics ours.)

If applicable to transferees with respect to transfers made before its passage, Section 280 of the Revenue Act of 1926 would attach to completed transactions consequences very unfavorable to the transferees which they could not have foreseen or contemplated when the transactions were consummated, and would also deprive transferees of very substantial rights. This is shown by a brief comparison of the respective methods of enforcement of transferee liability available to the United States before and after the enactment of the Revenue Act of 1926.

Prior to the enactment of the Revenue Act of 1926, the liability of a transferee of a taxpayer's assets to the Government was usually determined and enforced in a suit in equity on a creditor's bill. See *Capps Manufacturing Co.* v. *United States*, 15 F. (2d) 528 (C. C. A., 5th Circ.); *McWilliams* v. *Excelsior Coal Co.*, 298 Fed. 884 (C. C. A., 8th Circ.). See also 3 STORY'S EQUITY JURISPRUDENCE, 14 ed., §1660. Under the Revenue Act of 1926, such liability is determined and enforced as is a tax. See REVENUE ACT OF 1926, §§280, 274 (44 Stat. 61, 55). The Commissioner of Internal Revenue asserts the liability. If the transferee appeals to the Board of Tax Appeals, his liability

is determined by "an independent agency in the executive branch of the Government". See REVENUE ACT OF 1924, §900 (k) (43 Stat. 338); REVENUE ACT OF 1926, §900 (44 Stat. 105). The Board has no equitable power and the only parties are the Commissioner and the petitioner. See dissenting opinion of Milliken, Member, in *Cappellini* v. *Commissioner*, 14 B. T. A. 1269, 1286, 1288. There is an appeal to a Circuit Court of Appeals from a decision of the Board, but the Board's determination of questions of fact has the same weight as a verdict of a jury on a writ of error. See REVENUE ACT OF 1926, §1003 (44 Stat. 110). See *Avery* v. *Commissioner*, 22 F. (2d) 6 (C. C. A., 5th Circ.). If the transferee does not appeal to the Board, an assessment may be made against him and his property may be distrained without a hearing. See REV. STAT. §§3187-3209, 26 U. S. C. A. §§116-138. If his property is distrained, or if he pays the tax, the transferee can get relief only by instituting a court action, in which he will have the burden of proving that he is not liable as a transferee. Until changed by Section 602 of the Revenue Act of 1928 (45 Stat. 872), this burden rested upon the transferee in the Board of Tax Appeals also. See BOARD OF TAX APPEALS RULE 30.

The changes effected by Section 280 of the Revenue Act of 1926, deprived the transferee of an antecedent transfer of

(1) A determination of his alleged liability in a *judicial* proceeding as a condition precedent to the taking of his property to satisfy it;

(2) The right to bring his co-transferees into the proceeding by cross-bill and get an adjudication of rights be-

tween himself and them such as the right of contribution. (See 5 POMEROY'S EQUITY JURISPRUDENCE, 2 ed., §2332; *Boss v. United States*, 290 Fed. 167; *United States* v. *Snook*, 24 F. (2d) 844, 845; Equity Rule *XXXVII*);

(3) The right to have the principal debtor brought into the proceeding and get an adjudication of rights between himself and such debtor (*First National Bank* v. *Shuler*, 153 N. Y. 163; 5 POMEROY'S EQUITY JURISPRUDENCE, 2 ed., §2314; Equity Rule *XXXVII*);

(4) The right to have other creditors brought into the proceeding so that he will not have to pay twice (See *National Tradesmen's Bank* v. *Wetmore*, 124 N. Y. 241; 5 POMEROY'S EQUITY JURISPRUDENCE, 2 ed., §2314; Equity Rule *XXXVII*);

(5) The right to other equitable relief, such as marshalling of assets, accounting and cancellation of instruments; and

(6) Freedom from the burden of proof (*United States* v. *Lam*, 26 F. (2d) 830).

A statute which, if retroactive, would deprive a person of so many and such substantial rights as those enumerated above is certainly the kind of statute to which this Court denies retroactive application unless it is required by express language.

It is immaterial that some of the changes effected by Section 280 of the Revenue Act of 1926 may be regarded, so far as retrospective, as mere changes of procedure in the enforcement of an existing claim. The rule against retrospective construction has been frequently applied to prevent retroactive application of changes in procedure. In *Russell* v. *United States*, 278 U. S. 181, this Court held

that the provision in Section 278 (d) of the Revenue Act of 1924 (43 Stat. 299), which authorized collection of a tax within six years after assessment, did not apply retrospectively to an assessment made before that Act was passed. The Court said (pp. 187-188):

> "If an assessment made before that date came within the ambit of §278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years a liability which had almost expired. *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162, declares—'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.' No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in §278 or otherwhere."

See also *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Railway Co., supra; Farmers' & Mechanics' National Bank* v. *United States*, 11 F. (2d) 348 (C. C. A., 3rd Circ.), and *United States* v. *St. Louis, San Francisco & Texas Railway Co., supra.* In the latter case this Court said (p. 3):

> "That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure, *United States Fidelity and Guaranty Co.* v. *United States*, 209 U. S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435."

If the changes effected by Section 280 with respect to transferee liability are not sufficient to render the section unconstitutional as applied with respect to transfers made before it was passed, they at least raise very grave doubts as to its constitutionality as so applied. (See argument in the following point.) Such doubts make it imperative that the section be given only prospective construction. See *Blodgett* v. *Holden*, 275 U. S. 142, 147-148; *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 220; *United States* v. *Jin Fuey Moy*, 241 U. S. 294, 401. In this respect statutes relating to taxation are no different from others. *Lucas* v. *Alexander*, 279 U. S. 573, 577.

In *Blodgett* v. *Holden, supra*, Mr. Justice Holmes writing a separate opinion, said (pp. 147-148):

> "Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations *the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same.*" (Italics ours.)

There is absolutely no indication in Section 280 of the Revenue Act of 1926 that Congress intended it to apply retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment. Congress expressly stated that the tax (*i. e.*, the liability of the original taxpayer) for which the transferee was made liable might be a tax imposed either by the Revenue Act of 1926

or prior acts. See Subdivisions (a) (1) and (b) (2) of Section 280. But that is an entirely different liability from the liability that is imposed on the transferee. The transferee's liability, if any, arises when the transfer takes place. Not a word or syllable indicates that Congress intended Section 280 to apply where *the transfer* took place before its enactment. Therefore, not only under the foregoing rules of construction must the statute be confined to transfers subsequent to its enactment, but, in addition, the doctrine of *expressio unius est exclusio alterius* precludes any other interpretation.

If Section 280 is given retrospective construction, it will give to completed transfers consequences prejudicial to the transferee which he never contemplated or foresaw, and will unjustly deprive him of several very substantial rights, possibly in violation of the Constitution. Therefore, it should not be construed retrospectively.

POINT II.

If Section 280 of the Revenue Act of 1926 applies retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment, it deprives such a transferee of property without due process of law in violation of the Fifth Amendment.

As has been shown in the preceding point, Section 280 of the Revenue Act of 1926, if retrospective with respect to property transferred before its enactment, deprives a transferee of several very substantial rights. Such rights were vested in a transferee who received a transfer of a taxpayer's assets before the enactment of Section 280. To take away these rights by retroactive legislation de-

prives such a transferee of property without due process of law in violation of the Fifth Amendment. Section 280 is no less inconsistent with the requirements of due process than a statute taxing transfers made before its enactment. Such a retrospective taxing statute has recently been held unconstitutional by this Court. *Untermyer* v. *Anderson*, 276 U. S. 440. See also *Nichols* v. *Coolidge*, 274 U. S. 531 and *Blodgett* v. *Holden, supra.*

The recent case of *Graham* v. *Goodcell*, 282 U. S. 409, in which this Court held that Section 611 of the Revenue Act of 1928 (45 Stat. 875), although retrospective, does not violate the due process clause of the Fifth Amendment, is not inconsistent with the argument here made. The question in that case was whether Section 611 was constitutional in so far as it excepted from the operation of Section 607 of the same Act, which gives the right to a refund of taxes paid after the expiration of the applicable period of limitations, cases in which the tax was seasonably assessed, a claim in abatement filed, collection stayed and the tax paid before or within one year after the enactment of the Act. The ground of the decision, as is clearly shown in the opinion of Chief Justice Hughes, was that the provision was for the purpose of correcting a mistake on the part of the Treasury Department in believing that the statute of limitations did not apply to distraint proceedings to collect a tax. The holding is merely to the effect that the Constitution does not prevent the Legislature from curing a defect or mistake in administration simply because the effect may be to destroy rights which would otherwise exist.

If Section 280 of the Revenue Act of 1926 is retrospective, it is unconstitutional in its application to a transferee with respect to assets transferred before its enactment.

CONCLUSION.

South Penn Oil Company as *amicus curiae* respectfully submits that the judgment in this case should be reversed, and requests that if it is affirmed this Court expressly reserve for future consideration the contentions presented in this brief.

Respectfully submitted,

OSCAR R. EWING,
Counsel for South Penn Oil Company as *Amicus Curiae*.